THE PARADOX OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS' TRANSFORMATIVE POWER

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Abstract

Human rights problems exist all over Europe. Although the European Court of Human Rights is competent to deal with individual complaints about such problems, the Court is much criticised. Moreover, there may be little political will or capacity to tackle the structural problems which have caused such complaints to be made. At the same time, the judgments of the Court can be shown to have great impact on national case-law, legislation and policy. Paradoxically, thus, the Court's case-law has an important transformative power, as is further explained in this essay.

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I. HUMAN RIGHTS PROBLEMS IN EUROPE

Human rights problems are all around us, and it seems that new issues continue to arise all over Europe. There is the situation in Turkey, for example, where judges have been dismissed and journalists are being prosecuted for allegedly having supported Gülen or at least for not properly supporting president Erdoğan.[2] Perhaps a bit differently, but also a great cause for concern from a human rights perspective, in Hungary and Poland, the work of constitutional courts is curtailed and minority rights and religious freedom are under pressure.[3] In Russia, human rights problems range from appalling prison conditions[4] and torture of

[2] For more information, see e.g. www.coe.int/en/web/media-freedom (last visited 15 May 2017).

[3] Cf eg Commission Recommendation regarding the rule of law in Poland, Brussels, 27 July 2016, C(2016)5703 final; European Parliament Resolution on the situation in Hungary, Brussels, 16 December 2015, 215/2935(RSP).

[4] Cf Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 May to 4 June 2012, Strasbourg, 17 December 2013, CPT/Inf (2013) 41.

detainees[5] to altogether too strict rules on the right to demonstrate[6] and the discouragement of non-governmental organisations.[7] In France, an emergency situation was announced in November 2015, resulting in serious restrictions of individual liberties and fair trial rights.[8] In the UK, the Brexit only seems a forewarning to the UK wanting to leave the European Convention on Human Rights.[9]

It is possible to continue for quite a long time summing up such urgent threats and risks to the protection of human rights in nearly all the European states. Clearly, there are many causes for concern about the protection of liberty, dignity and equality of the people living in Europe, and there are clear reasons to accept that there is a need for

[5] See eg *Olisov and others v Russia*, ECtHR, 2 May 2017, app nos 10825/09 and 2 others, referring to various earlier judgments.

[6] See eg *Navalnyy v Russia*, ECtHR, 2 February 2017, app nos 29580/12 and 4 others and *Lashmankin and others v Russia* ECtHR, 7 February 2017, app nos 57818/08 and 14 others.

[7] Cf Opinion of the Commissioner for Human Rights, *Legislation and Practice in the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards: an Update* (Strasbourg, 9 July 2015) CommDH(2015)17.

[8] See Declaration contained in a Note verbale from the Permanent Representation of France, dated 24 November 2015, registered at the Secretariat General on 24 November 2015, via http://conventions.coe.int (last visited 15 May 2017) and see Loi n° 2015-1501 of 20 November 2015; the emergency situation was extended for another six months in July 2016 (Loi n° 2016-987 of 21 July 2016) and in December 2016 (Loi no 2016-1767 of 19 December 2016). At the time of writing, it was not clear yet if it would be prolonged for yet another period from July 2017 onwards.

[9] UK must leave European convention on human rights, says Theresa May, *The Guardian* (25 April 2016), www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum and Theresa May "will campaign to leave the European Convention on Human Rights in 2020 election", *The Independent* (29 December 2016), www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html (last visited 15 May 2017). At the time of writing, it was still an open question if Theresa May would take a stance on the issue in her election campaign for the 2017 elections; see eg Britain to be bound by European Convention on Human Rights until 2022, *The Telegraph* (26 April 2017), www.telegraph.co.uk/news/2017/04/26/britain-likely-bound-european-convention-human-rights-2022/; Theresa May urged to clarify stance on European rights convention, *The Guardian* (25 April 2017), www.theguardian.com/law/2017/apr/25/theresa-may-urged-to-clarify-stance-on-european-rights-convention (last visited 15 May 2017).

a mechanism to help improve the situation. Indeed, Europeans can consider themselves lucky that in 1950, now almost 67 years ago, the drafters of the European Convention on Human Rights did not only lay down a well-considered list of human rights, but also conceived a system to monitor compliance, an alarm bell signifying the risk that a State would fall back into totalitarianism that could be rung by both States and individuals.[10] At the time, it was hoped that the mechanism would scarcely be needed. Little could the drafters have expected that, nowadays, about forty to sixty thousand complaints are brought to the Court each year,[11] and that so many human rights problems still exist.

Perhaps this may raise the question how effective the system established by the drafters of the European Convention really is. It may well be possible to despair about this, especially if it is seen that some states allow judgments of the European Court of Human Rights to be reviewed and overruled by a national supreme court,[12] and some

[10] On this objective of the Convention, see further e.g. E. Bates, *The Evolution of the European Convention on Human Rights — From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010).

[11] For the statistics, see www.coe.int statistics.

[12] Although the German Federal Constitutional Court was the first to accept this possibility in 2004, it has never overruled any of the European Court of Human Rights' judgments; given the perspective of openness and friendliness towards European law that is prevailing in this Court's case-law, the possibility seems merely theoretical. This is different for the Constitutional Court of Russia, which has been granted the possibility for reviewing judgments of the Court for compatibility with the Russian Constitution much more recently, yet has used it several times already. It is evident that this could seriously harm the authority of the European Court of Human Rights in Russia. See more elaborately European Commission for Democracy through Law (Venice Commission), *Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court*, Strasbourg, 13 June 2016, Opinion No. 832/2015, CDL-AD(2016)016. For examples over overruling, see eg N. Chaeva, The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in Anchugov and Gladkov, *EJIL: Talk!* (26 April 2017), www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladko/ and Commissioner for Human Rights of the Council of Europe, Commissioner concerned about non-implementation of a judgment of the European Court of Human Rights in Russia (Press release 20 January 2017), www.coe.int/en/web/commissioner/-/commissioner-concerned-about-non-implementation-of-a-judgment-of-the-european-court-of-human-rights-in-russia (both last visited 15 May 2017).

parties maintain that it would be just as easy and effective to abolish the Convention and protect human rights on the national level and leave the system for that reason.[13] Indeed, in various states there appears to be political criticism of the current system and the way it aims to protect human rights in Europe.[14]

II. THE EUROPEAN COURT OF HUMAN RIGHTS' TRANSFORMATIVE POWER

Importantly, regardless of the national criticism and the resistance against the Court's interferences in national sovereignty, the Court is generally regarded as one of the most world's most influential and effective international institutions.[15] The very fact that the Court receives so many applications each year indicates how much trust individuals put in the ability of the Court to provide for protection and offer redress. Moreover, even though it sometimes may take a long time, eventually, most of the judgments of the European Court of Human Rights are

[13] As seems to be the position of the Conservative Party in the United Kingdom; see the 2015 election manifesto *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), www.conservatives.com/~/media/files/.../human_rights.pdf (last visited 15 May 2017). On the situation in the United Kingdom, see in more detail R. Masterman, The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights?, in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) 449–478 at 465.

[14] See more elaborately P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016); J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (Antwerp, Intersentia 2014); S. Flogaitis, T. Zwart and J. Fraser (eds), *The European Court of Human Rights and its Discontents. Turning Criticism into Strength* (Cheltenham, Edward Elgar, 2013).

[15] H. Keller and A. Stone Sweet, Introduction: The Reception of the ECHR in National Legal Orders, in H. Keller and A. Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008) 3–28 at 3.

complied with.[16] In addition, they appear to have great impact on national law.[17] In the Netherlands, for example, the entire system for legal protection against administrative decisions was overhauled after just one judgment of the Court made clear that the old system offered individuals too little access to court.[18] Similarly, the Nordic countries have changed their age-old "closed-shop" systems, which compelled workers to become members of trade unions, after the Court had found that this was contrary to the freedom of association.[19] In Italy, efforts are being made to make court procedures more efficient.[20] Central and Eastern European states actively try to comply with the Court's judgments when restoring property that has been nationalised under communist regimes and, more generally, to model their legal systems to the standards set in the Convention.[21] In Russia, the Constitutional

[16] Individual judgments are usually executed, if only by paying a certain amount of compensation to the victim; this is not to say, however, that structural or systemic problems causing these individual cases to be brought are actually solved; see further eg L.R. Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Antwerp, Intersentia, 2016) 45–48.

[17] See eg L.R. Helfer, Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 19 *European Journal of International Law* (2008) 125–159; H. Keller and A. Stone Sweet (n 6); G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen, European Law Publishing, 2010); P. Popelier, C. Van de Heyning and P. van Nuffel (eds), *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp, Intersentia, 2011); Gerards and Fleuren (n 5); I. Motoc and I. Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge University Press, 2016).

[18] *Benthem v the Netherlands*, ECtHR, 23 October 1985, app no 8848/80.

[19] In particular *Sørensen and Rasmussen v Denmark*, ECtHR (GC), 11 January 2006, app nos 52562/99 and 52620/99.

[20] This has been done upon *Bottazzi v Italy*, ECtHR (GC), 28 July 1999, app no 34884/97, but without much success; see *Gaglione and others v Italy*, ECtHR, 21 December 2010, app nos 45867/07 et al; for the efforts made, see www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp (last visited 15 May 2017).

[21] See classically *Broniowski v Poland*, ECtHR (GC), 22 June 2004, app no 31443/96 and the follow-up judgment in *Wolkenberg and Others v Poland*, ECtHR 4 December 2007 (dec), app no 50003/99. More generally, for the impact on the national law in these states, see Motoc and Ziemele (n 1).

Court has based numerous decisions on the case-law of the European Court of Human Rights.[22] Indeed, a recent study has shown that at some point, every single State has made at least some fundamental, structural or systemic changes in national law and policy in response to a judgment of the Court.[23] Thus, the list of changes made to national law in consequence of the Convention is almost as long as that of human rights problems.

These examples show that having an independent European watchdog has great value. By far the most States appear to accept the Court's analyses and act upon them,[24] even if they sometimes do so grudgingly and reluctantly and may severely criticise the Court for making inroads on their national sovereignty.[25] In many cases, the judgments are complied with, national legislation is adapted, domestic practice is changed, and, in short, national law is transformed.[26]

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[22] A. Matta and A. Mazmanyan, Russia: In Quest for A European Identity, in Popelier, Lambrecht and Lemmens (n 5) 481–502 at 499 and A.I. Kovler, European Convention on Human Rights in Russia: Fifteen years later, in I. Motoc and I. Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge, Cambridge University Press, 2016) 351–371 at 356.

[23] See the report by the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, *Impact of the European Convention on Human Rights in States Parties: selected examples* (Strasbourg, 8 January 2016) AS/Jur/Inf (2016) 04. Moreover, such changes are made both in response to judg-ments against that particular State and in response to judgments against other States, as is clear from Gerards and Fleuren (n 1). See further K.J. Alter, L.R. Helfer and M.R. Madsen, How Context Shapes the Authority of International Courts, 79 *Law and Contemporary Problems* (2016) 1–36 at 10–11, 16. It may be argued that the extent of the ECtHR's authorities differs between the various States — its authority in a State like the Netherland is likely to be much stronger than that in, for example, Russia.

[24] The Committee of Ministers of the Council of Europe in 2016 even noted an increase in the number of cases closed in 2015; see Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, Annual Report (Strasbourg 2016).

[25] In more detail on these dynamics, see Popelier, Lambrecht and Lemmens (n 5).

[26] *Ibid*; see also sources mentioned in n 1.

III. THE PARADOX OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The above goes to show that, inherent to the Convention system, there appears to be a paradox. On the one hand, there is much evidence of the great success of the European Convention on Human Rights and its impact on national law and policy. On the other hand, looking back at sixty-seven years of European Convention, we can see that, overall, human rights problems have far from disappeared. In fact, it seems that problems have shifted and their nature has changed, rather than that they have been solved. This may raise the question how this paradox can be explained, and it is this question that this contribution aims to answer. Over the past years, the causes of national criticism, reluctance and lack of political will have been extensively explored and mapped out,[27] even to such an extent that they sometimes seem to overshadow the attention paid to the impact-side of the paradox. It is for that reason, that this essay will focus on the Court's impact and, in particular, aims to explain its transformative power. It seeks to explain this power by looking at the Court's historical role of standard-setting in human rights cases, the need of national courts for such standards, and the feedback loop created by the adoption of the European Court's standards by national courts.

IV. THE POWER OF REASONING AND THE COURT'S STANDARD-SETTING ROLE

Many explanations can be given for the Court's transformative power as it has been defined in section 2. They range from the independent status of the Court and the authority of its judges to the socialising effect of the public nature of the Court's judgments — indeed, if it is for everyone to see that a State has violated individuals' most important rights, this may cause a public outcry that many States will try to avoid, or at least States may want to repair their reputation as

[27] See sources mentioned in n 5.

soon as they can.[28] However, a highly significant explanation for the Court's transformative power also relates to its role of interpreting the Convention, explaining its wording, and determining how the various provisions should be applied in concrete cases.[29] At this point, it should be emphasised that the Court has no strong tools available to guarantee the execution of its judgments. It cannot impose a fine if a State does not comply, and there is no European police force that can bring a State to justice.[30] For the Court, this means that its transformative power strongly depends on whether it manages to convince the national authorities of the rightness of its decisions.[31] The interesting question therefore is: what is contained in the Court's judgments that makes them so authoritative, and that makes States comply even without a mechanism of coercion?

At least part of the answer to this question can be found in the way the Court has fulfilled its role of interpretation and standard-setting. Although initially the Court still received very few applications, when they started to trickle in in the 1970s, it gave it the occasion to start developing the Convention.[32] The Court's judges made good use of this unique opportunity to think deeply and provide a set of a very well-considered general criteria, principles and notions of human rights adjudication.[33] In fact all judgments the Court handed down in this

[28] For such explanations, see already L.R. Helfer and A.-M. Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 *Yale Law Review* (1997) 273–391; see more recently Alter, Helfer and Madsen (n 7) at 17ff.

[29] See Article 19 ECHR and cf A. Stone Sweet, The European Convention on Human Rights and National Constitutional Reordering, 33 *Cardozo Law Review* (2012) 1859–1868.

[30] Cf Alter, Helfer and Madsen (n 7) at 6.

[31] See eg A.-M. Slaughter, A Typology of Transjudicial Communication, 29 *University of Richmond Law Review* (1994) 99; Keller and Stone Sweet (n 6); Alter, Helfer and Madsen (n 7) at 3–4.

[32] See further also M.R. Madsen, The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash, 79 *Law and Contemporary Problems* (2016) 141–178 at 146.

[33] See also W. Sadurski, Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments, 9 *Human Rights Law Review* (2009) 397–453.

first period of its existence can be rightly claimed to be "classics", which continue to be read and studied by law students and professionals alike.[34] Notions and doctrines such as the margin of appreciation doctrine, common ground review, the fair balance test, positive obligations and methods of meta-teleological and autonomous interpretation, which have become part of almost every lawyer's vocabulary, were all developed at the time.[35]

Yet, although the creation of such standards and doctrines is an important step, it is not enough to guarantee their automatic implementation in national law. There is an additional factor that is needed to explain the successful transition of the Court's standards and its transformative power. As Laurence Helfer has explained, this factor is the gradual, but deep embedding of the Court's standards and doctrines in national case-law.[36]

V. EMBEDDING OF CONVENTION STANDARDS IN NATIONAL CASE-LAW

In the early days of the Convention, human rights law was not yet strongly developed, neither on the international level nor on the national level. There are a few notable exceptions, such as Germany, with its very active Federal Constitutional Court, but in most States, it was difficult and very uncommon for individuals to complain about violations of their human rights before their national courts. In the Netherlands, for example, there was, and still is, a prohibition on constitutional review, which means that it is not possible for individuals to complain about legislation that infringes their constitutional rights, such as the right to

[34] Bates (n 1) speaks of the "golden era" of Strasbourg jurisprudence (at 320).

[35] See classically cases such as the *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR, 23 July 1968, app. no 1474/62; *Golder v the United Kingdom*, ECtHR, 21 February 1975, app no 4451/70; *Engel v the Netherlands*, ECtHR, 8 June 1976, app no 5100/72; *Tyrer v the United Kingdom*, ECtHR, 25 April 1978, app no 5856/72; *Marckx v Belgium*, ECtHR, 13 June 1979, app no 6833/74; *Airey v the United Kingdom*, ECtHR 9 October 1979, app no 6289/73. See also Bates (n 1) 321ff.

[36] Helfer (n 1).

freedom of religion or property rights.[37] Similarly, in the Nordic states it has long been considered hardly acceptable that a court would set aside legislation for its incompatibility with fundamental rights.[38] In the United Kingdom, the Convention could not be directly invoked before the courts until 1998,[39] and, of course, for the Eastern and Central European States, the Convention had not even entered into force.

Over the 1970s and 1980s, many changes occurred. Over this period, the human rights discourse gained enormous importance.[40] Citizens in western Europe became much more active in trying to influence legislation and policy-making by bringing cases to the courts, and they became very creative in finding new sources to make their claims, one of which was the European Convention.[41] And what's more, there was that other European Court, the Court of Justice of the European Union, which empowered national courts by creating new competences for them to review and possibly set aside national legislation and decisions.[42] In many European States, these developments brought about a gradual but steady increase in human rights adjudication on the national level.

Of course, to decide these cases on human rights, courts needed standards, doctrines and criteria. Human rights are often formulated rather openly, and much is needed to decide what exactly is covered by, for instance, the right to respect for one's private life, or to explain why an infringement of the freedom of expression can be justified. In some States, such standards could readily be found in their own

[37] See Article 120 of the Netherlands Constitution. On this, see further eg J. H. Gerards, The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It, 77 *Revue Interdisciplinaire d'Études Juridiques* (2016) 207–233.

[38] Eg I. Cameron and Th. Bull, Sweden, in Gerards and Fleuren (n 5) 269.

[39] In 1998, the Human Rights Act entered into force, which allows for a certain degree of judicial review of decisions and legislations for conformity of the Convention rights as incorporated in that act. See elaborately A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009).

[40] Bates (n 1) at 277ff.

[41] See generally B.A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Policies* (Cambridge, Cambridge University Press, 2009) 131ff.

[42] On the impact of this Court's work on national courts, see eg M. de Visser, *Constitutional Review in Europe. A comparative analysis* (Oxford, Hart, 2014). See also Madsen (n 6) at 152.

constitutional systems,[43] but in other States, these were lacking. For individuals, non-governmental organisations, civil society, as well as courts in these States, it appeared to be very useful that this Court had already provided for a number of well-developed and authoritative doctrines and standards.[44] Parties to court proceedings eagerly invoked them and, in response, many domestic courts adopted the Court's standards and fitted them into their own argumentative traditions. For example, various studies have shown that in Austria, Belgium and the Netherlands, courts have taken to applying the Convention standards in almost all cases on fundamental rights.[45] Similarly, a recent discourse analysis has revealed how the Finnish courts have increasingly adopted the Court's standards in relation to the right to a fair trial.[46] And even in States with well-established constitutional doctrines, courts have found reasons to apply European standards.[47]

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[43] Cf E. Bjorge, *Domestic application of the ECHR. Courts as faithful trustees* (Oxford University Press, 2015); Sadurski (n 1) at 433.

[44] Cf R. Harmsen, The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges Facing the European Court of Human Rights, in Martinico and Pollicino (n 1) at 33. Litigants were helped by the standards to shape their cases, for example in the United Kingdom; see Madsen (n 6) p 158.

[45] See A. Gamper, Austria: Endorsing the Convention System, Endorsing the Constitution, in Popelier, Lambrecht and Lemmens (n 5) 75–102 at 90; P. Popelier, The supremacy dilemma: The Belgian Constitutional Court caught between the European Court of Human Rights and the European Court of Justice, in Popelier, Van de Heyning and Van Nuffel (n 1) 155; G. Schaiko, P. Lemmens and K. Lemmens, Belgium, in Gerards and Fleuren (n 5) 137; J. H. Gerards and J. W. A. Fleuren, The Netherlands, *ibid*, 239.

[46] V. Koivu, *European Convention on Human Rights and the transition of legal culture* (Rovaniemi, Lapin Yliopisto, 2015) 368–369.

[47] Cf Bjorge (n 2) at 41ff; Madsen (n 6) at 158; E. Klein, Germany, Gerards and Fleuren (n 5) 210; R. Masterman, The United Kingdom, *ibid*, 320 and 321. These studies also show, however, that such implementation often may be limited and not all national courts are willing to make changes. To illustrate, the UK Supreme Court has made clear that the standards defined by the ECtHR could not be fitted in with the typical UK criminal law system, and it has requested the UK to revise them; although the ECtHR has not really done so, it has clarified and refined the standards in such a way as to make them more easily applicable in the UK. See, respectively, *R (Horncastle and Others)* [2009] UKSC 14 (*per* Lord Phillips), para. 11 and *Al-Khawaja and Tahery v the United Kingdom*, ECtHR (GC), 15 December 2011, app nos 26766/05 and 22228/06.

So in various ways and for various reasons, and perhaps to varying degrees, most courts in the "older" Convention States have learned to apply and value the European Court's standards and doctrines.[48] This has resulted in a deep embedding of these standards in the domestic law of these States.[49] Importantly, they thereby set an important example to the States that acceded to the Convention in the 1990s. Moreover, Courts in post-communist Europe have derived their own benefits from the standards set and applied by the European Court. In many Central and Eastern European States, Convention review of legislation has proven to be of great importance to the development of the new democratic systems.[50] In particular, in many Central and Eastern European States, the possibility of using the Court's standards has provided the constitutional courts with sufficient power to effectively exercise their supervisory role over the national legislative and executive bodies.[51]

VI. CREATING A FEEDBACK LOOP

The existence of useful high-quality standards set by the European Court of Human Rights at a time that national courts were in particular need of such standards, seems to be an important explanation for the Court's success. National courts have adopted its standards and use them in their own, national adjudication.[52] This has brought about an even deeper impact of the Convention case-law, when, applying the newly adopted doctrines, national courts start to re-interpret national legislation or quash decisions which they find to be inconsistent with the Convention. This often led to legislative or administrative changes after a domestic judgment has been handed down. Moreover, national

[48] Cf Harmsen (n 3) at 47; Madsen (n 6) at 143.

[49] Helfer (n 1).

[50] Cf Sadurski (n 1) at 442; A. Albi, On secret legislation, blanket data recording, arrest warrants and property rules: questions on the rule of law and judicial review in the light of post-communist constitutions, in Popelier, Van de Heyning and Van Nuffel (n 1) 173–210. Of course, there are differences between the various states; on this, see in particular the various chapters on these states in Popelier, Lambrecht and Lemmens (n 9).

[51] Cf Sadurski (n 1) at 438.

[52] Cf Alter, Helfer and Madsen (n 7) at 22–23.

legislators and decision-makers have learned to anticipate on this and may now try to prevent Convention violations from taking place.[53] Admittedly, this process of embedding has been (and continues to be) slow and halting, but it goes a long way to explaining how and why the Court's standard-setting helps to transform national law and make it Convention-compatible. This process of embedding and transformation is a continual one, as the Court has never stopped developing new standards and criteria to keep pace with developments in European law and society.[54] In recent years, for example, the Court has refined its standards in relation to the harm done by overcrowded prisons,[55] and clarified its standards of protection of the procedural rights of suspects of crime.[56] Also in relation to these new standards, it is clear that national courts will have to fit them in with their own case-law, thus contributing to the development of Convention law.

VII. CONCLUSION

Hence, the Court has made an impressive contribution to the national protection of human rights by means of the standard-setting in its judgments, and it made good headway in making national law compatible with the Convention. In the end, however, the paradox remains. Many of today's human rights problems cannot be solved by means of judgments of the European Court, however good they are and however useful standards they may contain. The empowerment of national courts can solve systemic problems only to a certain degree, and in some States, the system of transforming national law through case-law simply does not function very smoothly at all.[57] In addition,

[53] Cf Koivu (n 5).

[54] Quite to the contrary; cf Sadurski (n 1) at 431.

[55] *Muršić v Croatia*, ECtHR (GC), 20 October 2016, app no 7334/13.

[56] *Ibrahim and Others v the United Kingdom*, ECtHR (GC), 13 September 2016, app nos 50541/08, 50571/08, 50573/08 and 40351/09.

[57] Cf O. Akbulut, Turkey: The European Convention on Human Rights as a tool for modernisation, in Popelier, Lambrecht and Lemmens (n 5) 413–446 at 443–444 and A. Matta and A. Mazmanyan, Russia: In quest for a European identity, *ibid*, 481–502.

the national application of the Court's case-law strongly depends on a constant quality and persuasiveness of these standards, a matter which is under pressure as a result of the Court's heavy case-load.[58] Moreover, it seems likely that the Convention's paradox cannot be solved as long as there is little belief in international co-operation and supervision by a supranational court. But be that as it may, without the European Court on Human Rights, the outlook would be much bleaker. There would be no possibility for individuals to bring their individual predicaments to the attention of an international court, and thereby of the international media and international politics, and of the outside world more generally. It also would mean that there would be no possibility for the Court to hand down well-drafted, well-considered judgments, which may be taken seriously by at least some national authorities, and which may become the basis for national or international efforts by NGO's, human rights defenders, solicitors, politicians, the media and national judges to conduct an open debate on how best to protect certain human rights issues and how to deal with the Convention. It can only be hoped, therefore, that the paradox eventually will be solved in favour of the impact side, and that states accept the Court's help in actually reducing and, eventually, ending the human rights problems in Europe.

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[58] There certainly is criticism of these standards, sometimes of a concrete nature, sometimes more general; the degree of criticism may influence the willingness of national courts to adopt the principles and criteria developed in the Court's case-law. See further eg N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford University Press, 2010) p. 126; Gerards and Fleuren (n 9); Popelier, Lambrecht and Lemmens (n 24); for some critical reflections, see in particular Flogaitis, Zwart and Fraser (n 13).

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